



Sheria Hicks (“Hicks”) was convicted of Class C felony possession of cocaine and Class D felony possession of marijuana. On appeal, Hicks only contests his conviction for possession of cocaine. We find one issue dispositive: whether the prosecutor committed misconduct amounting to fundamental error by commenting on Hicks’s right to remain silent.

Concluding that the State’s closing argument referring to Hicks’s post-Miranda silence violated his right to fundamental fairness under the due process clause, we reverse and remand.

### **Facts and Procedural History**

On March 19, 2005, Indiana State Trooper Patrick Etter (“Trooper Etter”) stopped a Ford Explorer for speeding on I-70 in Hendricks County. He found four passengers in the vehicle. Isha Johnson (“Isha”) was in the driver’s seat; Hicks was in the front passenger’s seat; and Jalana Johnson (“Jalana”) and Charles Harris (“Harris”) were in the back seats. They were driving from Colorado to Ohio for spring break. Trooper Etter smelled a strong odor of freshly burnt marijuana emitting from the vehicle, and he noticed that all four occupants of the vehicle were lethargic and had red, glassy eyes.

Suspecting that the occupants of the vehicle were under the influence of marijuana, Trooper Etter called for backup. A K-9 officer arrived with his dog, and Jalana, who had rented the vehicle, consented to a search. From outside the vehicle, the dog indicated that there were narcotics in several locations. The officers then handcuffed the four occupants and opened the trunk of the vehicle. Inside, they found a clear plastic container in plain view containing 68.91 grams of marijuana. They also found marijuana

plant material and seeds on the seats of the vehicle. In the ashtray on the front console, the officers found the remains of a burnt blunt and a hollowed out cigar that had been filled with marijuana. In the back of the vehicle, the officers also found a Folgers Crystals coffee container located in a storage compartment between the seats among other luggage. In the container, the police found a plastic bag hidden underneath the coffee grinds. The bag contained 124 grams, or about \$13,000 worth, of cocaine.

The police Mirandized the four occupants of the vehicle and then began asking them questions about the narcotics found. Jalana admitted that they had been smoking marijuana ever since they left Colorado. Nobody else admitted to having smoked marijuana. In fact, Hicks and Harris first claimed they had been sleeping during the entire drive and had not seen anybody use marijuana. While talking to the officers, Hicks and Harris changed their stories a couple of times and later claimed they had been watching movies in the back of the vehicle.

None of the occupants admitted to knowing about the cocaine. While they were being questioned, the four occupants were handcuffed and sitting on the side of the road. Hicks told Jalana to keep quiet. Trooper Etter asked Hicks if his fingerprints would be found on the coffee container. Hicks replied that his fingerprints could possibly be on the container as he might have moved the container in order to reach other things. In fact, all the occupants said that their fingerprints might be on the container as they could have inadvertently moved it. The police never tested the container for fingerprints.

On March 21, 2005, the State charged Hicks with four felony counts, a misdemeanor and an infraction. The State later amended the information, dropping

several charges. At trial, Jalana testified that she saw Hicks put the coffee container, along with all of the passengers' other luggage, into the car. Tr. p. 174. The prosecutor also elicited from Trooper Etter that after the narcotics had been found, Hicks was uncooperative and refused to answer questions. In closing argument, the prosecutor asked the jury to think about the situation logically and question whether someone who was unaware there was cocaine in the vehicle would refuse to say anything after police had discovered narcotics.

On January 18, 2006, a jury found Hicks guilty of Class C felony possession of cocaine and Class D felony possession of marijuana. Hicks now appeals his conviction for possession of cocaine. Additional facts will be added as necessary.

### **Discussion and Decision**

Hicks contends that the prosecutor made improper use of his post-Miranda silence in violation of the principles announced in Doyle v. Ohio, 426 U.S. 610 (1976) and Wainwright v. Greenfield, 474 U.S. 284 (1986).

“The use of a defendant’s assertion of the right to remain silent either to impeach or as substantive evidence of guilt violates the Due Process Clause of the Fourteenth Amendment.” Willsey v. State, 698 N.E.2d 784, 791 (Ind. 1998) (citations omitted). In Doyle and subsequent cases, the Supreme Court has held that it is “fundamentally unfair and a deprivation of due process to advise defendants of their right to remain silent and then to punish them if they chose to exercise that right.” Id. at 792. Although mention of a defendant’s post-Miranda silence is not completely barred, the prosecution may not use a defendant’s decision to stand mute to create an inference of guilt. Id.

Hicks asserts the prosecutor improperly used his silence to imply he was guilty when Trooper Etter testified on direct examination as follows:

Q: What did you do whenever you were done with the search of the vehicle?

A: I had uh, individually mirandized – advised each person of their Miranda Rights and tried to question each person about the narcotics that I found.

Q: Did you talk to the defendant, Sheria Hicks?

A: Yes, I did.

Q: And what – what – what was the nature of that conversation?

A: Uh, he initially told me that he was asleep the entire time after leaving Colorado. He stated he, uh, did not see anybody smoking any marijuana nor did he smell any marijuana. Um, as I would go down the line and then come back he didn't – had changed his story and stated that he had been in the back and there was a laptop – a Dell laptop computer, uh, that was there and that he stated he was in the back watching movies, uh, part of the time. When I had stopped him he was in the front seat and so apparently he had been in several – but obviously he wasn't asleep the entire time. Um, so those were the different stories he had given me. And then I had questioned him about the cocaine. He advised he didn't know anything about it. I questioned him about the fingerprints being on the container. He stated that they possibly were because, you know, he might have moved it around to get other things. And then after that he refused to cooperate any further and would not answer any of my questions.

Tr. pp. 147-48.

Additionally, in closing argument, the prosecutor argued to the jury as follows:

They find [the drugs] here. What's your reaction? What's your reaction? Is it don't say nothing? Don't say nothing. Don't say nothing. Is that your reaction? God, no. Shock. I didn't do it. I didn't even know it was there. I don't have any idea. I didn't know that was in the back. I don't know. Am I cooperating? Don't say nothing. That's the defendant's reaction. . . . Put yourself in this position. How would your reaction be? Think about it logically.

Id. at 228.

When reviewing claims of prosecutorial misconduct, we consider first whether the prosecutor committed misconduct, and second, whether the alleged misconduct placed the defendant in grave peril. Robinson v. State, 693 N.E.2d 548, 551 (Ind. 1998) (citation omitted). “The gravity of the peril is determined by considering the probable persuasive effect of the misconduct on the jury’s decision, rather than the degree of the impropriety of the conduct.” Id. (quoting Willoughby v. State, 660 N.E.2d 570, 582 (Ind.1996)).

A defendant is required to object and request an admonishment when faced with alleged prosecutorial misconduct. Reid v. State, 719 N.E.2d 451, 458 (Ind. Ct. App. 1999), cert. denied, 531 U.S. 995 (2000). The failure to request an admonishment or move for mistrial results in waiver of the issue. Id. Once waived, an issue will warrant reversal only if it amounts to fundamental error, i.e., error that is so prejudicial to the rights of a defendant as to make a fair trial impossible. Carter v. State, 738 N.E.2d 665, 677 (Ind. 2000) (citations omitted). Hicks neither requested that the jury be admonished nor moved for a mistrial.

Nevertheless, Indiana courts will not permit a prosecutor to use a defendant’s post-arrest, post-Miranda silence as a means of impeachment, consistent with the rationale of Doyle. See Henson v. State, 514 N.E.2d 1064, 1067 (Ind. 1987). Because the Miranda warnings implicitly assure a person that his or her silence will carry no penalty, it violates due process if a defendant’s post-Miranda silence is subsequently used against him or her for impeachment purposes at trial. Francis v. State, 758 N.E.2d 528, 531 (Ind. 2001) (citing Doyle, 426 U.S. at 619). Therefore, an alleged Doyle violation is of constitutional

magnitude and may be reviewed under the fundamental error doctrine. Taylor v. State, 717 N.E.2d 90, 93 (Ind. 1999) (citation omitted).

In this case, the prosecutor explicitly argued that Hicks's silence upon the officers finding cocaine in the vehicle implicated him in the possession of the cocaine. In so doing, the State improperly used Hicks's post-Miranda silence in violation of the principles announced in Doyle and Wainwright. "[T]he right of silence after Miranda warnings is of constitutional dimension," Greenfield, 474 U.S. at 293, and cannot be lightly disregarded as the prosecutor did here.

An improper comment on a defendant's exercise of his Fifth Amendment right against self-incrimination must be analyzed in light of the harmless error doctrine. Robinette v. State, 741 N.E.2d 1162, 1164 (Ind. 2001). Thus, this court must ask if "absent the prosecutor's allusion to the defendant's post-arrest failure to deny the charged conduct, it is clear beyond a reasonable doubt that the jury would have returned a guilty verdict." Bevis v. State, 614 N.E.2d 599, 602 (Ind. Ct. App. 1993) (citation omitted).

Among the factors to be addressed in this analysis are (1) the use to which the prosecution puts the post-arrest silence; (2) who elected to pursue the line of questioning; (3) the quantum of other evidence indicative of guilt; (4) the intensity and frequency of the reference; and (5) the availability to the trial court of an opportunity to take curative measures. McCollum v. State, 582 N.E.2d 804, 813 (Ind. 1991).

After assessing the record and applying the above factors, we cannot conclude that the error here was harmless. First, the State used the evidence of Hicks's silence to explicitly argue that his silence was indicative of his guilt in possessing the cocaine. This

was not merely an inadvertent reference to the defendant's post-Miranda silence made by Trooper Etter, see McCollum, 582 N.E.2d at 813-814, nor was it a simple inquiry into whether Hicks's had invoked his right to refuse interrogation or asked for counsel to be present. See Henson, 514 N.E.2d at 1066-67; Cook v. State, 544 N.E.2d 1359, 1363 (Ind. 1989). In those situations, error occasioned by a Doyle violation has been held to be harmless error. Here, in contrast, not only did the State elicit testimony from Trooper Etter about Hicks's silence regarding the cocaine, but then the prosecutor relied heavily on this evidence in the closing argument when she told the jury that a person who was unaware there was cocaine in the vehicle would have expressed "[s]hock" and claimed "I didn't do it. I didn't even know it was there." Tr. p. 228.

Second, the quantum of evidence in the record is not so overwhelming as to outweigh the harmful effect of the State's closing argument. See, e.g., Henson, 514 N.E.2d at 1068 (overwhelming quantity of evidence supported guilty verdict). In order to convict Hicks, the State had to prove beyond a reasonable doubt that Hicks knowingly or intentionally possessed more than three grams of cocaine. Ind. Code § 35-48-4-6 (2004 & Supp. 2006). Jalana was the State's primary witness regarding Hicks's knowledge and possession of the cocaine. She testified that Hicks had loaded all of the luggage, including the Folgers container, into the vehicle. However, the cocaine was concealed in the bottom of the container hidden underneath coffee grinds. The container was also located in the back of the vehicle with the other luggage, while Hicks was sitting in the front passenger seat. This certainly is not overwhelming evidence of Hicks's knowledge of the cocaine nor his possession of the cocaine.



Furthermore, there appeared to be several inconsistencies in Jalana's testimony, especially regarding what she had previously told the police. Even the prosecutor admitted in her closing argument, "[a]nd I saw very concerned looks and some head rubbing and eyebrow furrowing when [Jalana] was on the stand testifying." Tr. p. 221. In addition to these inconsistencies, Jalana's credibility was further disputed as the State dropped all felony charges against her and allowed her to plead guilty to misdemeanor possession of marijuana, for which she received probation. (See Bevis, 614 N.E.2d at 603 (concluding that the credibility of the State's primary witness was in dispute due to a plea agreement)). Moreover, Trooper Etter testified that Isha, not Hicks, had put her hand down in the Folgers container, indicating to the police that there was something hidden underneath the coffee grinds. Id. at 144.

Third, the prosecution elicited the statements from Trooper Etter regarding Hicks's silence and subsequently referred to this evidence with great intensity in her closing arguments. The prosecutor's closing argument amounted to the State beseeching the jury to rely upon the impermissible inference that a defendant's silence implies his guilt. Moreover, as Hicks did not object to the prosecutor's statements, the trial court did not have the opportunity to admonish the jury to disregard the prosecutor's statements nor explain that Hicks had a constitutional right to remain silent after being Mirandized.

Because a Doyle violation is inherently prejudicial, reversal is the norm rather than the exception. See Bevis, 614 N.E.2d at 604. Under the present circumstances, we cannot conclude, beyond a reasonable doubt, that the violation did not have some

influence on the jury. Hence, we conclude that the State's references to Hicks's post-Miranda silence constituted reversible error.

### **Conclusion**

For the foregoing reasons, Hicks's conviction of Class C felony possession of cocaine must be reversed and the case remanded for a new trial.

Reversed and remanded.

KIRSCH, C. J., and SHARPNACK, J., concur.